

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA, <div style="text-align: center;">Plaintiff,</div> <div style="text-align: center;">vs.</div> TERRY L. MOUNTAIN, <div style="text-align: center;">Defendant.</div>))))))))))	CASE NO. 8:10CR192 TENTATIVE FINDINGS
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The Court has received the Presentence Investigation Report (“PSR”) and the Defendant’s objections thereto (Filing No. 106). The government adopted the PSR (Filing No. 115). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant objects to ¶¶ 42 (career offender status), and 76-79 (criminal history points), arguing that Criminal History Category IV, rather than VI, should be applied. The Defendant also moves for a downward departure or variance based on over representation of criminal history, arguing that Criminal History Category III is more appropriate.

The Defendant's objections to ¶ 42 will be heard at sentencing. The burden is on the government by a preponderance of the evidence. If the Defendant is successful in his challenge to ¶ 42, his objections to ¶¶ 76-79 will be heard, with the burden being on the government by a preponderance of the evidence.

Paragraph 7(c) of the plea agreement provides: “The Defendant agrees not to seek or suggest a sentence reduction below the applicable Guidelines range for any reason. The Defendant agrees that a Guideline sentence is a reasonable sentence.” Therefore, the Defendant's motion for a downward departure or variance is denied.

IT IS ORDERED:

1. The Defendant's objections to ¶ 42 (career offender status) will be heard at sentencing and, if the Defendant is successful with respect to ¶ 42 his objections to ¶¶ 76-79 (criminal history points) will be heard;
2. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;
3. Absent submission of the information required by paragraph 2 of this Order, my tentative findings may become final;
4. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing; and
5. The Defendant's motion for a downward departure or variance (Filing No. 106) is denied.

DATED this 15th day of November, 2010.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge